Mr. Dulku gave as his reason for not going to arbitration in the first place the House of Lords' decision in *Mottram Consultants Ltd.* v. *Bernard Sunley & Sons Ltd.*[1] Learned counsel appears to regard *Mottram's* case as a proposition for the rule that though overvaluation should be referred to arbitration, the amount set out in the certificate should however first be paid.

It appears to us that far from being a general proposition of law, *Mottram's* case was decided on its peculiar set of facts, and is not applicable here.

We do not feel that it would serve any useful purpose to examine each and every one of the numerous points which Mr. Dulku raised to support his contention that the Order 14 judgment should remain. The substance of his argument is that the interim certificates are valid, there is no suggestion that Mr. Wong is not qualified to act and certify under section 7(2) of the Architects Act 1967, and that the defence to respondents' application for an Order 14 judgment are mere allegations and afterthought.

What is clear to us is that there appears to be a plentitude of triable issues. It is trite law that leave to defend must be given unless it is clear that there is no real substantial question to be tried (*Codd* v. *Delap*)[2] or unless there is no dispute as to facts or law which raises a reasonable doubt that plaintiff is entitled to judgment.

The appeal was therefore allowed with costs here and in the Court below. We also ordered that the action be stayed, since by consent the parties will now submit their dispute to Arbitration. The sum of $505,700.00 shall be refunded to appellants with interest from April 5, 1985, at 8% per annum to date of payment thereof.

We also order refund of the deposit to appellants.

Order accordingly.

Solicitors: *Chong Wai Meng & Van Buerle; Mahinder Singh Dulku & Co.*

(1) NAMASIYIAM (2) RAJINDRAN (3) GOH CHIN PENG, and (4) NG AH KIAT v. PUBLIC PROSECUTOR

[S.C. (Salleh Abas L.P., Wan Suleiman & Syed Agil Barakbah S.C.JJ.) January 5 & 6, and March 31, 1987]

[Kuala Lumpur – Supreme Court Criminal Appeal Nos. 58, 59, 60 & 61 of 1985]

Criminal Law and Procedure – Offence of trafficking in dangerous drug – Whether offence one of doing an act preparatory to the offence of trafficking – Whether there was break in chain of evidence in relation to exhibits – Evidence of agent provocateur – Informer taking active part as accomplice – Not called as witness – Common intention – Evidence Act, 1950, s. 114(g) – Dangerous Drugs Act, 1952, s. 40A(1) – Penal Code, s. 34.

Evidence – Exhibits – Chain of evidence – Agent provocateur – Informer taking active part as accomplice not called as witness – Evidence Act, 1950, s. 114(g).

Dangerous Drugs – Trafficking in heroin – Chain of evidence in relation to exhibits.

The four appellants had been charged under section 39B(1)(c) of the Dangerous Drugs Act 1952 in that in furtherance of the common intention of them all, they did do an act preparatory to trafficking in a dangerous drug, *i.e.* 1,871.6 gms. of heroin and thereby committed an offence punishable under section 39B(2) of the Act read with section 34 of the Penal Code. They were convicted and each sentenced to death. They appealed against their conviction and sentence. The facts showed that the accused were arrested as a result of a trap laid by the police with the assistance of an agent of the Drug Enforcement Administration of the United States and an informer. There were several grounds of appeal raised by each of the appellants but there were two common grounds:

(1) The learned trial Judge erred in law in failing to appreciate the break in the chain of evidence adduced by the prosecution regarding the recovery, safe-keeping, movements and production of the ten packets of heroin (Ex P.5 A-J), the subject-matter of the charge preferred against the appellants and which had raised a serious doubt in the prosecution case that the exhibits seized by the police at the scene of the crime were the very same exhibits which were produced in Court by the prosecution.

2) That the learned Judge erred in law by concluding that the appellants were guilty of trafficking in heroin under section 39B(1)(a) of the Act instead of the offence of doing an act preparatory to the offence of trafficking under sub-section (c) as stated in the charge.

Held: (1) there was sufficient evidence as to the movements of the exhibits adduced by the prosecution in this case and there was no break in the chain of evidence affecting proof as to the identity of the said exhibits;

(2) in this case the learned trial judge in fact found each of the appellants guilty as charged under section 39B(1)(c) of the Dangerous Drugs Act, 1952. He also expressed the view that there was sufficient evidence to find

the appellants guilty of trafficking in the said drugs even under section 39B(1)(a) of the Act so as to invoke the presumptions under section 37(d) and (da) of the Act. However he did not appear to have applied the presumptions and convicted each of the appellants on the charge on the evidence adduced. In the circumstances the appellants do not have any grounds for complaint;

(3) in the case of the first appellant the trial Judge was correct in calling upon him for his defence and there were sufficient grounds for the Judge to reject the defence and convict him of the charge;

(4) in regard to the defence of the second appellant, the agent of the Drug Enforcement Administration was an *agent provocateur* and as such he is protected by the provisions of section 40A(1) and (2) of the Dangerous Drugs Act in that he is not presumed to be unworthy of credit and his evidence relating to any attempt to abet or abetment of the offence if done for the purpose of securing evidence against an accused person is admissible. Similarly any statement made to him by the accused person shall be admissible at the trial. There is therefore no requirement for the evidence of the *agent provocateur* to be corroborated;

(5) the evidence revealed that the informer played an active part from the beginning to the end of the episode. He was a *particeps criminis,* an accomplice in the true sense of the word. However in the light of the overwhelming prosecution evidence, the presence of the informer at the trial would not have made any difference;

(6) having regard to the second appellant's involvement in the negotiations as deposed by the prosecution witnesses, the manner in which the transactions were carried out and his overall conduct in the deal, the learned Judge was right in finding the second appellant guilty as charged;

(7) in regard to the third appellant the learned Judge was justified in rejecting the defence that he meant to sell his father's land and not the dangerous drug and that he was the victim of a frame-up;

(8) in regard to the fourth appellant his actions as related by the prosecution witnesses lead to one and only inference *viz.* that there was a common intention to commit the very offence with which the appellants were convicted and the commission of the intended offence was done in furtherance of the common intention;

(9) considering the facts and circumstances of the case as a whole, the defence story of a land transaction was completely implausible and it was most improbable that the appellants were so naive as to be innocent victims of a frame-up. The appeals should therefore be dismissed.

SUPREME COURT.

R. Rajasingam for the first appellant.

S. Anthonysamy for the second appellant.

Mahinder Singh Duku for the third appellant.

Paramjit Singh for the fourth appellant.

Mohamed Bazin Idris (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court): The four appellants were tried and convicted of an offence under section 39B(1)(c) of the Dangerous Drugs Act 1952 and were each sentenced to death by the High Court Judge, Penang. The charge against them reads:

"That you on 20th February 1981 at about 1.30 pm beside the Ambassadress Hotel, Jalan Bangan Luar, in the District of Butterworth, in the State of Penang, in furtherance of the common intention of you all, did on your own behalf do an act preparatory to trafficking in a dangerous drug to wit 1,871.6 grammes of heroin, by arranging to deliver for sale such drug, in contravention of section 39B(1)(c) of the Dangerous Drugs Act 1952 (Revised 1980) and that you have thereby committed an offence punishable under section 39B(2) of the same Act read with section 34 of the Penal Code."

Being dissatisfied with their conviction and sentence, they have appealed to the Supreme Court.

Before dealing with the grounds of appeal, we would like to touch on the salient facts of the case as accepted by the trial Judge. This was one of the cases where an officer of the Anti-Dadah Section of the Royal Malaysian Police, Bukit Aman, Kuala Lumpur, Balbir Singh (P.W.3), worked together with an American agent of the Drug Enforcement Administration of the United States, in the person of Raymond James McKinnon (P.W.1). The latter had about twenty-one years experience in anti-narcotic activities and some time in 1981 was posted to Drug Enforcement Administration Kuala Lumpur and had since assisted the Malaysian Police and Customs in this field. He was a professional and claimed to have made four to five hundred arrests in the course of his twenty-one years service.

On January 27, 1981, as a result of a meeting between the two who have worked before in anti-dadah activities, P.W.1 informed P.W.3 of his intended negotiation for the supply of 10 lbs of heroin in Penang. P.W. 3 requested P.W.1 to keep him informed of future developments on the matter. They met again on February 18, 1981, in the Rest House, Penang, where P.W.1 briefed P.W.3 and at the same time showed him $100,000/- cash in a briefcase which would be used for the purpose of purchasing the heroin. He also informed P.W.3 that the money would be kept in the boot of his car AB 3146 and requested P.W.3 to ensure the security of the money during P.W.1's meeting with the supplier.

According to P.W.1, prior to that, on January 19, 1981, he met the first appellant through the introduction of an informer. As a result of discuss-

ion, the three of them met again on January 26, 1981, at about 7.30 p.m. at Waterfall Hotel, Penang. The discussion ended with P.W.1 agreeing to buy 10 lbs of heroin at $16,000/– per pound, the supply of which was to be negotiated by the first appellant. P.W.1 promised to return some time in mid-February with the money. Subsequently on February 17, 1981, P.W.1 came to Penang and was told by the same informer to meet him and the first appellant at Villa Roma Coffee House, Sunrise Towers, Penang. P.W.1 accordingly informed P.W.3 about his intended meeting the next day requesting P.W.3 and his police personnel to keep surveillance. The next day at about 11.00 a.m. P.W.1 drove to Sunrise Towers where he was introduced by the informer to the second appellant and the third appellant. He noticed the first appellant was downstairs standing in front of the Coffee House. P.W.1 confirmed his intention of purchasing the 10 lbs heroin and showed the third appellant the $100,000/– in the briefcase which was in the boot of his car parked outside the building. The third appellant seemed to be satisfied and returned to the Coffee House to join the second appellant and the informer. It was agreed that the supply of the heroin and the payment of the money was to be made from one hotel room to another the next day. However, the plan was aborted when P.W.1 received a telephone call from the informer that the venue was to be at Kuala Lumpur Hotel in Butterworth. P.W.1 informed P.W.3 by phone of the change. The next morning on February 20, 1981, at about 10.00 a.m. P.W.1 accompanied by the informer drove his car to Kuala Lumpur Hotel, Butterworth. P.W.3 and his police party followed in another car. They kept surveillance of the area, observing the movements of P.W.1 and the others. P.W.1 and the informer walked to the Glass Corner Coffee House on the other side of the hotel. At about 11.30 a.m. the second appellant came in and asked P.W.1 whether he had the money and was ready to act. Thereafter, the second appellant searched P.W.1 in the hotel toilet to make sure that he had no weapon. After that, all the three went out and stood on the street where the first and third appellants joined them. Then the third appellant and the informer walked away to meet a male Chinese in red-flowered shirt and had conversation with him. P.W.1 identified the man as the fourth appellant. The third appellant and the informer returned and the third appellant informed P.W.1 that the fourth appellant wanted P.W.1 to move his car to the front of the coffee house and that they had decided that the exchange of drugs and money was to be made from car to car instead of from room to room as agreed earlier. P.W.1 duly complied and parked his car as requested. After that, the fourth appellant walked across the street and joined the others. On request, P.W.1 took the third and fourth appellants to his car where he opened the boot and the briefcase containing the money and showed to the fourth appellant who had a close look and counted the money. The third appellant then informed P.W.1 that the fourth appellant would go and get the heroin. P.W.1 saw the first, second and fourth appellants walk across the street and board a bus which proceeded in the direction of the ferry. The third appellant stayed with P.W.1. The second appellant returned about fifteen minutes later to join them. There was a discussion and it was agreed that P.W.1 would inspect the heroin in the first appellant's car while the third appellant would be near P.W.1's car and after P.W.1 was satisfied with the heroin, the fourth appellant would give a signal to the third appellant who would then take the money from P.W.1's car. P.W.1 handed his car keys to the third appellant. After that, the third appellant and the informer walked to P.W.1's car while P.W.1 and the second appellant walked towards the fourth appellant who was standing at an alley where there was a white stationary Volvo with the first appellant at the wheel. The second appellant and P.W.1 walked to the boot of the Volvo. The fourth appellant took up position from where he could see both P.W.1's car and the Volvo. (See sketch plan on page 323 (Exhibit P.3) and photo of Volvo at page 324 of Criminal Appeal No. 61/85). The first appellant alighted and opened the boot of the Volvo. P.W.1 saw a cardboard box tied with string which he untied and opened the box. He found the plastic bags containing an off white brownish coloured powder (P.4 id). (Exhibit P.5 A-J). P.W.1 signalled by waving his hand to the fourth appellant signifying his acceptance. As arranged with P.W.3 and police personnel who were then present around the area, it was also a signal that the heroin had arrived. It was at that juncture the Police rushed in, while P.W.1 quickly walked across the street to the Kuala Lumpur Hotel. About half an hour later, P.W.3 came and returned to P.W.1 his car key and briefcase containing the $100,000/–.

What transpired during the trap was told by P.W.3 whose testimony was accepted by the trial Judge (1) confirming the airport meeting with P.W.1 on July 2, 1981, and thereafter communications between them regarding the drugs deal *etc.* and (2) his observation at Butterworth on February 20, 1981, which according to the Judge substantiated P.W.1's evidence. P.W.3 stated on that

day he saw the Volvo with the first appellant at the wheel parked in a lane and P.W.1 and the second appellant were examining something in the boot. When P.W.1 gave him the signal, P.W.3 rushed to the car and detained the first appellant. The second appellant who was running towards the theatre was pursued and apprehended by Cpl. Amiz (P.W.6). The third appellant was arrested by Inspector Lim (P.W.4) who took possession of the briefcase from P.W.1's car and handed it to P.W.3 with the money still intact. The fourth appellant was arrested by Inspector Khalid.

According to Inspector Lim (P.W.4) on the day that he was making observation in the vicinity of the shophouse in Butterworth, he saw the first, second and fourth appellants boarding a bus heading towards the direction of the ferry. Later he saw the informer open the boot of P.W.1's car and immediately after the fourth appellant nodded his head, the third appellant grabbed the briefcase from the boot and tried to escape, but he (P.W.4) pounced upon him and arrested him. P.W. 3 examined the boot of the Volvo and recovered the cardboard box containing ten plastic packets of heroin (P.5 A-J). He took possession and custody of both the car and the drugs and issued a search list. After making a report, P.W.3 handed over all the exhibits to DSP Ghazali (P.W.9), Deputy OCPD (Crimes), on February 20, 1981, at about 5.00 p.m.

At the close of the prosecution case, the learned trial Judge was satisfied that each of the appellant had a case to answer and called upon the defence. All the appellants gave evidence under oath. The defence also called three other witnesses.

The main brunt of the defence was directed towards Francis Thomas, the informer who it was alleged acted as an agent and negotiated a land deal with them on behalf of an American (P.W.1) who was anxious to buy land in Malaysia for the purpose of development and that they were victims of a frame-up by Francis who planted heroin in the first appellant's Volvo.

The first appellant testified that he was a pirate taxi driver residing at Nibong Tebal and had known the informer as Francis Thomas since 1980. He was also an experienced television and radio repairer and had requested Francis to get clients for him. They became good friends. He admitted that on January 19, 1981, he met Francis who requested him to drive the American (P.W.1) around sightseeing in his taxi. He refused as his car was old and not air-conditioned. After some drinks, Francis and P.W.1 left together. He confirmed the second meeting on January 26, 1981, when he accompanied Francis to the Waterfall Hotel, Penang, and there met P.W.1. He understood from Francis who had told him earlier that P.W.1 had plenty of money and wanted to buy land. Francis conversed with P.W.1 in English which he could not understand even though he could speak a little English. He denied that he was a member of a drug syndicate which could sell P.W.1 10 lbs of heroin at $16,000/– per pound, and maintained that he had never spoken to P.W.1 or Francis about drugs. The gist of the first appellant's defence was that he acted on the request of Francis who hired his taxi as transport, for which Francis paid him $200/–. As regards the event of February 18, 1981, at Villa Roma Coffee House, Sunrise Towers, Penang, he stated that he went there in response to the request by Francis who subsequently arrived with the second and third appellants. While they went up to the coffee house, he remained downstairs and chitchatted with a friend on the five-foot-way. He confirmed that subsequently P.W.1 and the third appellant came downstairs and walked to a car parked nearby where the boot was opened and both looked into it. Later, on Francis' request, he drove him, the second and the third appellants in his Volvo and dropped them at the pier. Francis paid him $10/– for petrol and asked him to meet him at the E & O Hotel, Penang at 8.30 a.m. the next day. On February 20, 1981, he arrived at the appointed time. Francis told him to wait for P.W.1 and borrowed his car, driving it away and returned about twenty-five minutes later. Since P.W.1 had not yet arrived, Francis told the first appellant to drive to Kuala Lumpur Hotel, Butterworth and to wait for him there. The first appellant did so. Francis and P.W.1 arrived about forty-five minutes later. After having breakfast, the first appellant saw Francis, P.W.1, the second and the third appellants standing in front of the Glass Corner Coffee House and joined them. Later, the fourth appellant also joined the group. Francis introduced the first appellant to the fourth appellant.

With regard to his Volvo, the first appellant stated that soon after the meeting, on instruction of Francis to park it in front of the Glass Corner Coffee House he drove it to the main road accompanied by the second appellant and made a 'U' turn. As he was nearing the parking place, the fourth appellant stopped him and requested for the loan of the Volvo. In spite of his reluctance, he had to yield and the fourth appellant drove off alone. He and the second appellant returned

to the spot in front of the coffee house to join Francis, P.W.1 and the third appellant. Soon after, the fourth appellant returned and informed them that the Volvo had broken down along the main road. Accompanied by the second and fourth appellants, the first appellant went to the Volvo and checked the faulty gear and repaired it. Then he drove the Volvo accompanied by the other two towards the ferry terminal at Butterworth. On arrival there, the fourth appellant appeared to be looking for someone, but soon gave up and they all returned in the Volvo with the first appellant at the wheel to the same coffee house. The first appellant parked the Volvo in a lane of a parking bay situated between the Ambassador Coffee House and the Rex Theatre in compliance with Francis' earlier instruction. (See sketch plan Exhibit P.3 in the Appeal Record). He still remained in the car to adjust a nut near the gear. He noticed on turning round that P.W.1 and the second appellant opening the boot of his car. However he carried on adjusting the gear lever. He was surprised when a pistol was pointed at his right temple by P.W.3. He alighted, handed over the car keys to P.W.3, after which he was handcuffed and taken to Butterworth Police Station.

The defence of the second, third and fourth appellants are conveniently taken together. The second appellant was a fisherman and met Francis in 1981. As he was in financial difficulties, he requested Francis to get him a job. On their second meeting, Francis told him a wealthy friend of his wanted to buy land in order to put up a factory for sea food processing and asked him to look for suitable land in the area. Subsequently, the second appellant met an old friend, the third appellant, by chance near a market and asked him whether he knew of any land for sale. The latter told him that his father wanted to sell his land. He conveyed the news to Francis who suggested a meeting with the third appellant on February 18, 1981. On that day, both crossed over by ferry to Penang where Francis took them to Villa Roma Coffee House and they met P.W.1. After the normal introduction, Francis asked the third appellant about the land and there was discussion also with P.W.1. Subsequently, Francis told the second appellant that P.W.1 had agreed to buy the land and requested him to arrange for a meeting with the third appellant and his father at about 10.00 a.m. on February 20, 1981, at the Glass Corner House near the Rex Cinema, Butterworth. On the appointed day, the second appellant came to Butterworth and after some inquiry found the place and met Francis and P.W.1 seated at a table. He told Francis the third appellant would be coming later. Subsequently, he accompanied the first appellant in the Volvo car. He corroborated the first appellant's evidence about making a 'U' turn along the main road and on the way back, meeting the fourth appellant who took over the Volvo, about accompanying the first appellant to repair the car, and later accompanying the first and fourth appellants to the ferry to wait for the third appellant's father. After that, the first appellant returned to their rendezvous and parked the Volvo between the Glass Corner Coffee House and the Rex Theatre but remained in the car. Later, on Francis' instruction, the second appellant took P.W.1 to have a look in the boot of the Volvo. Then he saw two persons rushing towards him. He ran back towards Rex Theatre but was arrested. The gist of the second appellant's testimony was that he was acting as a land broker to sell the land belonging to the third appellant's father to P.W.1.

The third appellant was a poultry farmer but as his business was failing, his father wanted to assist him embark on a new business and raise the capital by selling his land. The old man asked the third appellant to look for a buyer. Subsequently, he met the second appellant who negotiated with P.W.1 for the sale of the said land through Francis. He repeated the same story as that of the second appellant regarding their meeting with P.W.1 and Francis in Penang at Villa Roma Coffee House and their negotiation about the sale of land. According to Francis, P.W.1 wanted to see the title deed since he agreed to buy the land. After that, at Francis' request, the third appellant went to see the currency notes in $50/- denomination kept in a briefcase which was placed in the boot of a car parked outside the building downstairs.

The next day he received a telephone call from the second appellant telling him of a pending meeting at Butterworth and to bring along the title deed. That night the fourth appellant, a distant relative of the third appellant, paid him a visit in his house. When the third appellant told him about his land deal, the fourth appellant said he too had a piece of land to sell. He agreed to the former's suggestion that he accompanied him to Butterworth the next day to see a foreigner who was interested in buying land. On arrival at Butterworth, the third appellant met the second appellant who was in the company of Francis and P.W.1. He told Francis about his father's late arrival and about the fourth appellant who also had land to sell. Francis walked with him to meet the fourth appellant who was waiting across the road at Tan Chong Motors. After a short

conversation, all the three walked back to join P.W.1 who was with the first and second appellants.

The rest of the evidence was a repetition of the borrowing of the Volvo by the fourth appellant from the first appellant, the breaking down of the Volvo on the way and the repair made by the first appellant who drove it back to the parking lot. While the first appellant remained in the Volvo, Francis took the third appellant to P.W.1's car also parked nearby. Francis opened the boot and asked the third appellant to pick up a briefcase in the boot. As the third appellant was doing so, he was caught and arrested by the police.

With regard to the fourth appellant's evidence, he confirmed the meeting with the third appellant and accompanied him to Butterworth for the purpose of negotiating the sale of his own land with Francis who was introduced to him by the third appellant. He also met the first and second appellants and P.W.1. He also confirmed that he drove the Volvo on the instruction of Francis to fetch the third appellant's father at the Pier but the car broke down on the way. He returned to tell Francis and the first appellant of the breakdown and of his intention to go home as he was not sure that P.W.1 was a genuine buyer. Francis pacified him by showing a briefcase containing money kept in the boot of a car parked in front of the Ambassador Coffee House. He was impressed and rejoined Francis and the first, second and third appellants. Later, they proceeded to the Volvo and after repairs the first appellant drove the fourth appellant to the ferry to meet the third appellant's father. They returned without meeting the man. After the first appellant parked the Volvo in a lane near Rex Theatre, the fourth appellant went to the Ambassador Coffee House to ease himself. Later, as he was walking out, he was arrested by a police officer.

Having heard the defence, the learned Judge was convinced that it had failed to raise any reasonable doubt as to the prosecution case and considering the evidence as a whole, concluded that the defence seemed to confirm and strengthen the case for the prosecution. He found each of the appellant guilty as charged and passed the death sentence on each of the appellants as required by law.

There were several grounds of appeal raised by each of the appellants in their memorandum of appeal which we dealt with together. There are however two common grounds, *viz:*

(1) The learned trial Judge erred in law in failing to appreciate the break in the chain of evidence adduced by the prosecution regarding the recovery, safe-keeping, movements and production of the ten packets of heroin (Ex. P.5 A-J) the subject-matter of the charge preferred against the appellants and which had raised a serious doubt in the prosecution case that the exhibits seized by the police at the scene of the crime were the very same exhibits which were produced in Court by the prosecution.

(2) That the learned Judge erred in law by concluding that the appellants were guilty of trafficking in heroin under section 39B(1)(a) of the Act instead of the offence of doing an act preparatory to the offence of trafficking under sub-section (c) as stated in the charge.

As regards ground (1), according to prosecution evidence, after P.W.3 had seized the ten packets of heroin placed in a box in the boot of the Volvo he took them to Police Station, Butterworth where he marked the packets E.1 to E.10 respectively and the box as E before he handed them over to D.S.P. Ghazali (P.W.9), the Investigation Officer, at about 4.00 p.m. on the same day, *i.e.* February 20, 1981. P.W.9 having taken possession of the said exhibits handed them to D.S.P. Teoh of the same Police Station for custody in the safe. D.S.P. Teoh maintained a safe register as required under the I.G.P. instructions in order to ensure the safe custody and record the movements of the exhibits kept therein. (Ex. P.14). He died before the case was heard and could not therefore be called as a prosecution witness. It was submitted that there is no record whatsoever in the safe register that the Exhibits P.5 A-J were kept in the safe between February 20, 1981, and February 23, 1981, since the first and only entry in P.14 relating to the said exhibits being kept in the safe was on February 24, 1981. There was no entry of the said exhibits being made and of their movements being recorded prior to that date. The learned trial Judge considered the matter and rightly concluded that the safe register had not been reliably maintained. It was further submitted in the circumstances that the prosecution had failed to reach the required standard of strict proof that Ex. P.5 A-J were the very same exhibits handed over to the Government Chemist (P.W.5) for analysis and as a result there was a gap in the chain of evidence raising a grave doubt that the exhibits produced in Court were the very ones seized by P.W.3.

The learned trial Judge however considered the evidence of P.W.9 who having been recalled

for further examination and cross-examination supplied evidence regarding the alleged missing link. According to P.W.9 he himself on January 20, 1981, handed the exhibits to D.S.P. Teoh and saw him keep them in the safe and thereafter D.S.P. Teoh locked the safe. On February 23, 1981, he took out the same exhibits from the safe with the knowledge and in the presence of the D.S.P. in order to hand them over to the Chemist for analysis. But since the Chemist was very busy on that day, he handed the exhibits back to D.S.P. Teoh and saw him keep them in the same safe under lock and key. The next time he took out the exhibits again was on February 24, 1981, which as stated earlier were recorded in the register.

Apart from P.W.9's explanation which was accepted by the learned Judge, there was also the evidence of P.W.3 who identified in Court during the trial the exhibits P.5 A-J as the ones he had seized from the boot of the Volvo on the day in question and which he handed over to P.W.9, by the letters E.1 to E.10 which he had written on the said packets on February 20, 1981, and his initials below them. Similarly the Chemist (P.W.10) also identified the exhibits as the ones he had checked and analysed by the same letters E.1 to E.10 on the packets. P.W.9 also identified the exhibits by the same markings. The only discrepancy which was pointed out to us was that the Chemist stated in his evidence that he saw only the marking and nothing else indicating, according to the defence counsel, that there were no initials on the packets. We had the occasion to call for the said exhibits during this appeal and noted that apart from the bold letters E.1 – E.10 on the packets respectively, there were also the initials and the date written below each of them. We are satisfied that there is no vital contradiction between the evidence of the Chemist and P.W.3 or P.W.9. We are also satisfied that there was sufficient evidence as to the movements of the exhibits adduced by the prosecution from the time P.W.3 handed them to P.W.9, the time they were kept in the safe under lock and key by D.S.P. Teoh, the subsequent examination by the Chemist, the handing back of the exhibits by the Chemist to P.W.9 and the subsequent keeping of the same in the safe until their production in the trial Court. We are more than satisfied that there is no break in the chain of evidence affecting proof as to the identity of the said exhibits.

With regard to common ground (2), the trial Judge in fact found each of the appellants guilty as charged under section 39B(1)(c) of the Act and convicted them accordingly. (See pages 209 and 312 of the Appeal Record). In his grounds of judgment in dealing with the defence evidence, the trial Judge expressed the view that there was more than sufficient evidence to find the appellants guilty of trafficking in the said drugs even under sub-section 39B(1)(a) of the Act so as to invoke the presumptions under section 37(d) and (da) of the Act. We agree with him. That is because of the wide definition of trafficking in section 2 which includes *inter alia* the act of transporting, carrying, sending and delivering *etc.* Anyway he did not appear to have applied the presumptions but convicted each of the appellants of the charge on the evidence adduced. In the circumstances, we failed to see how the appellants have any grounds for complaint.

The First Appellant

Now, we would like to touch on the grounds raised by the first appellant at paras 4(iv), 6, 7, 8 and 10 of the memorandum. It was submitted that the learned trial Judge failed to appreciate that the whole of the prosecution case against the first appellant fell short of a *prima facie* case in respect of the charge framed, and that mere association with the other accused persons without any other admissible evidence could only tantamount to suspicion against the first appellant whose meetings with P.W.1 on the two earlier occasions had no connection or link whatsoever with the negotiations P.W.1 had with the second and third appellants on February 18, 1981. The learned Judge in the circumstances should have acquitted the first appellant at the close of the prosecution case without calling for his defence.

It must be noted that according to positive evidence accepted by the trial Judge the first appellant was the first person introduced by Francis to P.W.1 on January 19, 1981, at Church Street, Penang and both had a general discussion regarding P.W.1's intention to invest his money for good profits in Malaysia. The second meeting took place about a week later on January 26, 1981, at about 7.30 p.m. at Church Street, Penang where the three met again at Waterfall Hotel, Penang. In the course of their discussion, the first appellant agreed to arrange for the supply of 10 lbs of high quality heroin for the price of $16,000/– per pound, with his associates. P.W.1 agreed to purchase the amount for $160,000/– and promised to return in mid-February with the money. As promised, P.W.1 came for the third time on February 18, 1981, and met Francis, the second and the third appellants at Villa Roma Coffee House, Sun-

rise Towers. There a final deal was effected. Although the first appellant did not take part in the negotiation, P.W.1 inquired about him and was told the first appellant was downstairs. P.W.1 saw him standing by the front door. P.W.4 who was making observation, also saw the first appellant there. It was clear that the meeting on that day was a follow-up of the plan agreed upon between P.W.1 and the first appellant on January 26. The last event on February 20, 1981, was at Butterworth where P.W.1 met the second appellant who ascertained from P.W.1 that he was ready with the money in order to carry out the transaction. It is true at that point of time the first appellant was not there. However, P.W.1 saw him later walking with the second and fourth appellants across the street and catching a bus headed for the ferry point. Subsequent events as proved by the prosecution which led to the discovery of the drugs in a box kept in the boot of the first appellant's car after the first appellant had driven it to the parking bay until his arrest, all pointed to one conclusion only *i.e.* that he was knowingly involved in the crime with which he was charged. Clearly his association and actions in the futile attempt to deliver drugs went beyond the realm of suspicion. We agree that the trial Judge was correct in calling upon the first appellant to make his defence.

On similar grounds the first appellant's defence that he was a mere innocent tool in the hands of Francis who merely hired him to drive his taxi was rejected by the trial Judge. Apart from playing an important role in the earlier negotiations, his futile attempt to deliver the drugs to P.W.1 and other cogent evidence, the trial Judge also found him not to be a witness of truth. He was caught lying in maintaining that he could not understand the conversations between P.W.1 and the informer on the two occasions that they met when it came to light in Court that he understood English. These, in our view, are sufficient grounds for the Judge to reject the defence and convict the first appellant of the charge.

The Second Appellant

The first ground of appeal was abandoned by his counsel. We would like to touch on the second and third grounds together since they relate to P.W.1 and Francis whose participation in the case was manifested by evidence stated earlier. In the case of P.W.1 it was clear from the facts and surrounding circumstances that he was an *agent provocateur.* As such, he is protected by the provision of section 40A(1) and (2) of the Act in that he is not presumed to be unworthy of credit and his evidence relating to any attempt to abet or abetment of the offence if done for the purpose of securing evidence against an accused person, is admissible. Similarly, any statement made to him by an accused person shall be admissible at the trial. There is therefore no requirement for the evidence of an *agent provocateur* to be corroborated. That is not the case however with the informer, Francis. Evidence revealed that he took an active part from the beginning till the end of the episode by introducing P.W.1 to the first and second appellants, at times acting as P.W.1's spokesman, was present in all the meetings between P.W.1 and the appellants and lastly participated in the trap set up by P.W.1 and the police leading to the arrests of the appellants and the seizure of the drugs. It appeared that his involvement in assisting P.W.1 in trapping the appellant was known to the police who throughout the trial called him an informer. In the circumstances of the case, he is not and cannot be termed as an informer within the meaning of section 40 of the Act and cannot claim any protection from disclosure of his name and address or any matter which might lead to his discovery under the Act. On the contrary, no disclosure was necessary because he was known to the appellants who appeared to trust him. Clearly, Francis was a *particeps criminis,* an accomplice in the true sense of the word. It was submitted that the absence of Francis at the trial would raise the presumption under section 114(g) of the Evidence Act unfavourable to the prosecution. Be that as it may, in the light of overwhelming prosecution evidence as stated earlier, we do not think that the presence of Francis, had he been available, would have made any difference.

The last ground alleges that the learned trial Judge failed to consider the defence adequately.

The gist of the appellant's defence as evaluated by the learned Judge was that he was merely a broker trying to find a willing seller of land to P.W.1. He succeeded in getting the third appellant to sell his father's land. Having regard to the second appellant's involvement in the negotiations on the two occasions in Penang and Butterworth as deposed by the prosecution witnesses, the manner in which the transactions were carried out and his overall conduct in the deal, we agree with the learned Judge in finding the second appellant guilty as charged.

The Third Appellant

It was submitted the learned Judge was wrong

in rejecting the third appellant's defence in that he meant to sell his father's land and not heroin and was a victim of a frame-up by Francis.

First, the Judge held that the land alleged to be the subject-matter of sale to P.W.1 did not belong to the third appellant's parents only but to a third co-owner who was never informed of the proposed sale nor his concurrence obtained for the purpose. Reference was made to the agreement of sale of the said land made subsequently on August 10, 1981. The recitals to the agreement and paragraph 11 thereof clearly show that the land belongs to a third person, the original owner and vendor who has applied for the sub-division of the said land into lots and the issue of separate documents of title and pending that it is stipulated the original agreement of sale executed between the third appellant's parents and the original vendor was binding upon the parties to the present agreement. The learned Judge never said there were three vendors but there was a third co-owner who had to be consulted and whose concurrence was necessary before the sale could be effected.

Secondly, he held that it was premature for the third appellant to check on P.W.1's means on February 18, 1981, to purchase the land when at that stage all that had taken place was a preliminary discussion. He went on to say that such conduct of inspecting the money in the car would be more conducive to the proposed sale of heroin as put forward by the prosecution. It was submitted that the learned Judge failed to take into account the appellant's testimony that he did so on Francis' request in order to convince him of P.W.'s financial standing and of his ability to purchase land. We are satisfied that the Judge has taken that into account when he held that such conduct was rather unusual for a *bona fide* transaction of sale and purchase of land. He went on to consider as in the third ground that there was no evidence of any inspection of the land, no searches made in the land register and no solicitors consulted, although many such firms were readily available in Butterworth at the time.

It was further submitted that there was evidence that the third appellant received a telephone call from the second appellant to meet him at Butterworth the next day at about 10.00 a.m. in order to see P.W.1 and to take him to view the land. If that was true that the third appellant came to Butterworth for the purpose, what was the reason for him to get mixed up with the other appellants in the act preparatory to trafficking heroin on that day? There was no reason for him to accompany Francis to open the boot of P.W.1's car and take out the briefcase containing the cash when having already seen the money earlier, he had not yet met and spoken to P.W.1 about the sale of his father's land. Surely his action cannot in the least be consistent with that of a man who has come to see P.W.1 to negotiate a *bona fide* land deal. It must also be noted that at almost the same time as the third appellant was taking the briefcase containing the money, P.W.1 was being shown the drugs in the boot of the first appellant's car which was parked not far away, by the second appellant.

We do not propose to deal with the remaining grounds which, in our view, are minor and serve no purpose.

The Fourth Appellant

The main ground touched upon by the fourth appellant's counsel was that the learned Judge erred in law in failing to appreciate that the evidence adduced by the prosecution pertaining to "common intention" was far from satisfactory. In other words, it was the defence contention that the prosecution had failed to prove that the fourth appellant had committed the offence "in furtherance of the common intention" of all the four appellants and he should have been acquitted by the trial Judge at the close of the defence. Section 34 of the Penal Code states:

> "When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone."

In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention.

Where the prosecution case rests on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the

case and the conduct of the accused. (The Supreme Court (of India) on Criminal Law 1950-1960 by J.K. Soonavala page 188 to 193).

With regard to the fourth appellant, it was submitted that he went to the spot at the request of the third appellant to meet P.W.1 and was involved only on the day of arrest. He had not met P.W.1 Francis, the first or the second appellant prior to that. In our view, the evidence as told by Francis to P.W.1 that the fourth appellant was the boss of the syndicate and wanted to see the money was not admissible as being hearsay and prejudicial to the defence. Nevertheless, the conduct of the fourth appellant including the part that he played as seen by the prosecution witnesses and admitted in some instances by the appellant himself, is relevant.

In our considered judgment, the facts and circumstances of the case including the conduct of the fourth appellant which raise the inference of common intention may be summed up as follows.

First, after the arrival of the fourth appellant at Butterworth on February 20, 1981, all the appellants including P.W.1 and Francis gathered together at the meeting place at Butterworth. Then the third appellant informed P.W.1 that the fourth appellant wanted P.W.1 to move his car to the front of the coffee house because they had decided that the exchange of drugs and money was to be made from car to car. P.W.1 accordingly complied with the request and parked his car at the place as requested.

Secondly, on their request, P.W.1 took the third and fourth appellants to see the money in the boot of his car. The fourth appellant counted the money in the briefcase and appeared to be satisfied with it.

Thirdly, it was rather strange that the fourth appellant, who had just been introduced to Francis on that day by the third appellant, acted on the instruction of Francis to drive the first appellant's Volvo to fetch the third appellant's father instead of the third appellant himself doing it. The fourth appellant had to walk to the main road to stop the first appellant who was then driving the Volvo back to the meeting place.

Fourthly, the fourth appellant was alone driving the car for some time until he came back to inform the rest that the car had broken down. According to the defence evidence, the first appellant went to repair the gear and thereafter drove the fourth appellant to the pier to meet someone but returned subsequently to the meeting place where the first appellant remained in the car. It would have been more appropriate for the fourth appellant to ask the first appellant to drive him to the pier instead of taking over the car on his own, if at all the story of fetching the third appellant's father was true.

Fifthly, when both P.W.1's car and the first appellant's Volvo had been parked in their respective places, the fourth appellant took up position where he could see the two stationary vehicles and give a signal for the exchange of the heroin which was then in the boot of the first appellant's Volvo with the cash which was in the briefcase in the boot of P.W.1's car.

Lastly, what transpired after that has already been dealt with earlier showing that all the four appellants were caught red-handed in a police trap in broad daylight after the police had made observation of their movements until they approached the two stationary cars to complete their transaction. The action of the second appellant in accompanying P.W.1 to the Volvo to enable P.W.1 to take possession of the heroin in the boot, the action of the first appellant who was seated at the driver's seat in coming out to open the boot for them, the part played by the third appellant and Francis in going to P.W.1's car and opening the boot for the purpose of taking delivery of the money and, last but not least, the participation of the fourth appellant in giving a signal to him to finalise the transaction, lead to one and only one inference *viz.* that there was a common intention to commit the very offence with which the appellants are convicted of and the commission of the intended offence was done in furtherance of that common intention.

Considering the facts and circumstances of the case as a whole, we are satisfied that the defence story of a land transaction was completely implausible and that it was most improbable that the appellants were so naive as to be innocent victims of a frame-up by Francis.

In the circumstances, we dismiss the appeals and confirm the conviction and sentence of each of the appellants by the trial Court.

Appeals dismissed.

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